

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

FILED

JUL 08 2014

Clerk, U.S. District Court
District Of Montana
Missoula

KERMIT TY POULSON,

Cause No. CV 14-186-M-DLC-JCL

Petitioner,

vs.

LEROY KIRKEGARD; ATTORNEY
GENERAL OF THE STATE OF
MONTANA,

Respondents.

ORDER and FINDINGS AND
RECOMMENDATION OF U.S.
MAGISTRATE JUDGE

This case comes before the Court on Petitioner Kermit Poulson's motion to proceed in form pauperis and application for writ of habeas corpus. Poulson is a state prisoner proceeding pro se.

Although Poulson has not submitted an account statement, on this occasion the Court will overlook the defect. After reviewing the motion and supporting account statement, I find that Poulson has sufficiently shown he cannot afford to pay all costs that may be associated with this action. The motion to proceed in forma pauperis will be granted.

Poulson's petition, however, should be dismissed without prejudice. He states that he is challenging decisions entered in Montana's Eleventh Judicial District Court, Flathead County, in Cause Nos. DC 11-14 and DC 12-419. Pet.

(Doc. 1) at 2 ¶ 1. A notice of appeal was filed in Flathead County Cause No. DC 12-419 on June 2, 2014. *See Notice of Appeal, State v. Poulson*, No. DA 14-0340 (Mont. filed June 2, 2014). On June 3, 2014, counsel acting for Poulson filed in the Montana Supreme Court a petition for leave to file an out-of-time appeal in DC 11-14. *See State v. Poulson*, NO. DA 14-0341 (Mont. filed June 3, 2014). The court granted Poulson’s counsel’s petition. Order at 1, *Poulson*, No. DA 14-0341 (Mont. June 11, 2014). Consequently, an appeal is pending in the Montana Supreme Court as to both judgments Poulson seeks to challenge in this Court.

Before he may proceed in this Court, Poulson must exhaust his state judicial remedies by using the state’s normal channels for original and appellate review. *See Rose v. Lundy*, 455 U.S. 509, 520 (1981) (providing “a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court.”). Because Poulson has not exhausted his state remedies with respect to the convictions he seeks to challenge in his federal habeas petition, the federal petition should be dismissed without prejudice. Poulson may file a federal habeas petition after he has properly exhausted his available state remedies, including postconviction proceedings, if necessary. *Slack v. McDaniel*, 529 U.S. 473, 485-86 (2000).

A certificate of appealability, 28 U.S.C. § 2253(c)(2), is not warranted. Reasonable jurists would not find any exhausted claim or any reason to encourage

further proceedings in this Court at this time. *Gonzalez v. Thaler*, ___ U.S. __, 132 S. Ct. 641, 648 (2012) (quoting *Slack*, 529 U.S. at 484).

Based on the foregoing, the Court enters the following:

ORDER

Poulson's motion to proceed in forma pauperis (Doc. 2) is GRANTED. The Clerk of Court shall waive payment of the filing fee.

The Court also enters the following:

RECOMMENDATION

1. Poulson's petition (Docs. 1, 4) should be DISMISSED as unexhausted.
2. The Clerk of Court should be directed to enter, by separate document, a judgment of dismissal.
3. A certificate of appealability should be DENIED.

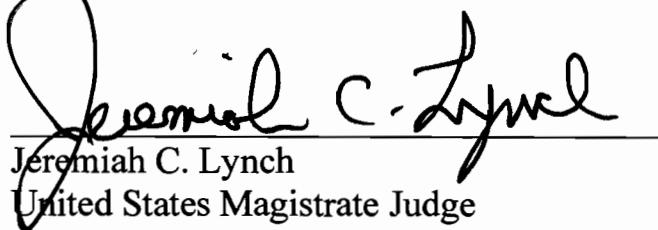
**NOTICE OF RIGHT TO OBJECT
TO FINDINGS & RECOMMENDATION
AND CONSEQUENCES OF FAILURE TO OBJECT**

Poulson may object to this Findings and Recommendation within 14 days.¹ 28 U.S.C. § 636(b)(1). Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

¹ As this deadline allows a party to act within 14 days after the Findings and Recommendation is "served," Fed. R. Civ. P. 6(d) applies, and three days are added after the time would otherwise expire.

Poulson must immediately notify the Court of any change in his mailing address by filing a "Notice of Change of Address." Failure to do so may result in dismissal of this action without notice to him.

DATED this 8th day of July, 2014



Jeremiah C. Lynch
United States Magistrate Judge